

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 236 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

PAM PHARMACEUTICALS

Versus

RICHARDSON VICKS INC.

Appearance:

MR RR SHAH for Petitioner

MR KS NANAVATI for MR RM CHHAYA for Respondent No. 1

RULE SERVED for Respondent No. 3

CORAM : MR.JUSTICE A.R.DAVE

Date of decision: 24/03/2000

ORAL JUDGEMENT

Being aggrieved by an order dated 6.4.1999 passed
below the Notice of motion in Civil Suit No. 854/99, the
appellant-original defendant No. 1 has approached this
court by way of this appeal from order. For the sake of
convenience, the parties to the litigation have been

referred to as they have been arrayed before the trial court. The appellant, defendant No. 1, has been aggrieved by the impugned order because, by virtue of the impugned order, during pendency of the suit, defendant No. 1 has been restrained from using mark 'VICAS' or any other mark, which is likely to infringe trade mark "VICKS" which is being used by the plaintiffs. Moreover, defendant No. 1 has also been restrained from manufacturing, selling or offering for sale, medicinal preparation and allied products using trade mark 'VICAS' or any other trade mark which might be deceptively similar to trade mark 'VICKS' of the plaintiffs.

.RS 2

#. The facts giving rise to the litigation, as stated by the plaintiffs in their plaint, in a nutshell, are as under :-

Plaintiff No. 1 is a corporation incorporated under the laws of the United States of America and the said plaintiff and its subsidiary companies are engaged in the business of manufacturing and marketing various medicinal products which are manufactured and sold under the trade mark 'VICKS' and plaintiff No. 1 is a proprietor of the said trade mark in India.

So far as plaintiff No. 2 is concerned, it is a subsidiary company of plaintiff No. 1, which has been incorporated under the provisions of the Companies Act, 1956, in India and it is also engaged in the business of manufacturing and marketing of medicinal products under the trade mark 'VICKS'.

It is their case that plaintiff No. 2 is the originator and owner of copyright of artistic work and get up contained in label having dark and light green colour wherein the mark 'VICKS' has been written in a novel manner and cough drops manufactured by the plaintiffs are being sold under the name of 'VICKS'. Plaintiff No. 1 is using the mark 'VICKS' for last about 100 years in respect of the medicinal preparations prepared by it and plaintiff No. 2, which is the subsidiary company of plaintiff No. 1, is manufacturing the medicinal preparations including cough drops under the trade mark 'VICKS' in India since 1971. Trade mark 'VICKS' has been registered under the provisions of the Trade and Merchandise Mark Act, 1958 (hereinafter referred to as the 'Trade Mark Act'). The said mark has been registered at Regn. No. 328355 in Class V in respect of pharmaceutical, sanitary substances, infant

foods, etc. It is the case of the plaintiffs that by use of the colour scheme adopted by them for the purpose of selling cough drops manufactured by them under the trade mark 'VICKS', they have tried to distinguish their product from the products which are being manufactured by other manufacturers. The label used by the plaintiffs for the purpose of sale of cough drops under trade mark 'VICKS' has been annexed to the plaint as Exh. 2/6.

It has been submitted by the plaintiffs that their product 'VICKS' has got a very good reputation in the Indian market because of the superior quality of medicinal ingredients used by them in the cough drops manufactured by them. It has been also submitted by them that for the purpose of popularising their product in the market, they had been spending enormous amount on advertisements. It is their case that the product is being advertised throughout India including Gujarat, through the media like Doordarshan, Zee TV, ZEE Cinema, Star Plus, Star Movies and other local media which are being used for advertising different products. The plaintiffs have also submitted that they had spent approximately Rs. 23 crores during 1993-98 for advertising their products 'VICKS' and as a result thereof, sale of their 'Vicks' products had increased from Rs. 45 crores per annum to Rs. 66 crores per annum from 1993-94 to 1997-98.

Thus, they have mainly submitted that they are the owners of trade mark 'VICKS' which is very popular in the entire country on account of its high quality of medicinal ingredients and advertisement campaigns carried out by the plaintiffs or their agents from time to time and the word 'VICKS' has been treated as one of the synonyms for cough drops.

#. The plaintiffs had approached the City Civil Court, Ahmedabad, by filing Regular Civil Suit No. 854/99 because, somewhere in January 1999, as they had learnt that defendant No. 2 was offering for sale cough drops under trade mark 'VICAS' written in a manner similar to the manner in which their trade mark 'VICKS' was written. It has been submitted by them that defendant No. 1 is manufacturing cough drops under mark 'VICAS' and the said mark is deceptively similar to the mark of the plaintiffs' trade mark 'VICKS'. It has been alleged in the plaint that because of the similarity in the mark and get up used by defendant No. 1, the defendants are trying to see that the product 'VICAS' is passed off to unwary customers as 'VICKS' and thereby the defendants are selling goods inferior in quality to the customers

with a dishonest intention which would amount to infringement of the trade mark of the plaintiffs.

Thus, it has been alleged by the plaintiffs that the defendants are trying to pass off the inferior quality of goods for the superior type of goods manufactured by the plaintiffs under the trade mark 'VICKS' and they are also violating the statutory rights of the plaintiffs under the Trade Mark Act as well as the Copyright Act, 1957 .

In the circumstances stated hereinabove, the suit has been filed by the plaintiffs with a prayer for a declaration that the defendants are not entitled to use the trade mark 'VICAS' and/or any other mark similar to the plaintiffs' trade mark 'VICKS' and any other artistic work similar to the artistic work of the plaintiffs and the defendants and their agents, servants etc. be permanently restrained from using the mark 'VICAS' or any other similar mark to the plaintiffs' trade mark 'VICKS'.

It is the plaintiffs' case that defendant No. 1 is manufacturing cough drops under the mark 'VICAS' and defendant No. 2 is selling the same in the city of Ahmedabad. An averment has been made in the plaint to the effect that the product in question which is being manufactured by defendant No. 1 at Wadhwan is being sold in Ahmedabad by defendant No. 2. So as to substantiate the submissions and averments made in the plaint, the plaintiffs had prayed for appointment of a court commissioner so that the court commissioner can ascertain whether the averments and allegations made in the plaint by the plaintiffs were correct.

Ultimately, the court commissioner appointed by the trial court had visited the shop of defendant No. 2 on 20.2.99 around 12.30 noon and had found that defendant No. 2 was selling cough drops named 'VICAS' manufactured by defendant No. 1. He reported to the trial court that he had found 11 jars, each jar containing 300 sachets of cough drops under mark 'VICAS' at the shop of defendant No. 2

In reply to the Notice of Motion filed by the plaintiffs, defendant No. 1 has filed its reply denying all the allegations and stating that defendant No. 1 is manufacturing cough drops under mark 'VICAS' since October 1998 and it had sold cough drops worth more than Rs. 17 lacs and it is having a very effective sales network of pharmaceutical preparation named 'VICAS' under distinctive label, colour scheme and get up and it has

been also submitted in the reply that the suit label 'VICAS' is not the property of plaintiff No. 1 and plaintiff No. 2 is not the proprietor of the label or trade mark 'VICKS' and plaintiff No. 2 is also not using the trade mark 'VICKS'. It has been submitted that no action for infringement would lie against defendant No. 1. It has been specifically submitted that the registration of the plaintiffs' trade mark under No. 328355 dated 30.8.77 was in class V in the name of Richardson Marrel, Inc. (a corporation organised and existing under the law of the State of Belaware, U.S.A.) and the plaintiffs had suppressed certain material facts with regard to the ownership of the said label and the licence agreement and validity of the agreement which was executed between plaintiff No. 1 and plaintiff No. 2. Moreover, it has been submitted in the reply that plaintiff No. 1 is not using the label 'VICKS' whereas plaintiff No. 2 is not entitled to use the label 'VICKS' and no sort of relationship between plaintiff No. 1 and plaintiff No. 2 was shown by the plaintiffs as required under the law.

It is also the case of defendant No. 1 that defendant No. 1 is having necessary licence to manufacture medicinal product in question under the mark 'VICAS' in a packing of a particular colour scheme and get up since 1.10.98 and it is selling the cough drops since 1.10.98 and by the time the suit was filed, the sale had exceeded Rs. 17 lacs. Moreover, defendant No. 1 is not selling the product in question in the city of Ahmedabad and it never sold the product to defendant No. 2 and therefore the City Civil Court, Ahmedabad had no jurisdiction to entertain the suit. Moreover, it is also contended that the application for injunction filed by the plaintiffs was not legal and was contrary to the provisions of the Trade Mark Act and Copyright Act and, therefore, the said application deserved to be dismissed. Moreover, even on the ground of misjoinder of causes, the suit should have been dismissed.

Several other contentions have been raised in the written statement but mainly the contention of defendant No. 1 is with regard to the jurisdiction of the City Civil Court, Ahmedabad. It has been mainly submitted that the City Civil Court had no jurisdiction as no cause of action had arisen in the city of Ahmedabad before the suit was filed. For the first time and that too after filing the suit, the cough drops under trade name 'VICAS' were sold on 20.2.99 by defendant No. 2 whereas the suit was filed on 18.2.99. Thus, prior to 20.2.99, the product in question was not sold by any of the defendants

in the city of Ahmedabad and therefore, the City Civil Court, Ahmedabad, had no jurisdiction to try the suit filed by the plaintiffs.

It is also the case of defendant No. 1 that material document to show how the copyright was obtained by the plaintiffs was not shown to the court and therefore action under the provisions of the Copyright Act was not maintainable. According to defendant No. 1, both the marks are not similar and because of the distinctive features they have, it is not possible to pass off product of defendant No. 1 as the product of the plaintiffs. The averments made by the plaintiffs with regard to superior quality of their product are also not admitted by defendant No. 1.

It is also the case of defendant No. 1 that the colour scheme and get up of the sachet of the cough drops in which the cough drops of the plaintiffs are being sold have become common to the trade and number of persons manufacturing cough drops are using either same or similar get up and colour scheme on the sachet used by them for the purpose of selling their cough drops. Moreover, the plaintiffs had made several changes in the get up of the sachet. In the circumstances, the plaintiffs have no exclusive right to use the colour scheme and get up for their trade and business.

Defendant No. 1 has also raised an objection with regard to capacity of the signatories to the plaint and the injunction application. The contention of defendant No. 1 is that the signatories to the plaint and the injunction application were not authorised by the plaintiffs to file the suit or the injunction application and therefore also the suit is not maintainable.

#. After hearing the concerned parties, the trial court has granted injunction in favour of the plaintiffs whereby defendant No. 1 has been restrained from manufacturing or selling its product "VICAS" by an order dated 6.4.99 and being aggrieved by the said order, defendant No. 1 has approached this court by way of the present appeal from order.

The trial court has prima facie come to the conclusion that plaintiff No. 1 is the owner of the trade mark 'VICKS' and plaintiff No. 2, being a subsidiary company of plaintiff No. 1, engaged in the business of manufacturing and marketing the medicinal product in question under the trade mark 'VICKS', the plaintiffs have a right to use the mark 'VICKS' on the

cough drops manufactured by plaintiff No. 2.

With regard to the jurisdiction of the City Civil Court at Ahmedabad, the trial court has prima facie come to the conclusion that the City Civil Court, Ahmedabad has jurisdiction to try the suit under the provisions of sec. 105 of the Trade Mark Act because on the basis of the report filed by the court commissioner being Mark A/6, it was found that the cough drops manufactured by defendant No. 1 under the name 'VICAS' were being sold in the city of Ahmedabad. The trial court has also prima facie come to the conclusion while passing the interlocutory order that even under the provisions of sec. 62 of the Copyright Act, the court has jurisdiction to try the suit because the said section gives a discretion to the plaintiffs with regard to the place where the defendants can be sued and if the plaintiffs select Ahmedabad, the place where one of the plaintiffs is selling their product, namely, 'VICKS', it cannot be said that the City Civil Court has no jurisdiction. The trial court has observed that looking to the special provisions incorporated in sec. 62 of the Copyright Act, it is not obligatory on the part of the plaintiffs to file a suit where the defendant resides. As per the provisions of sec. 62 of the Copyright Act, a suit can be filed even where the plaintiff is doing his business. In view of the fact that as the product of the plaintiffs is also being sold in Ahmedabad, the trial court has come to the conclusion that the plaintiffs have a right to file a suit in the City Civil Court at Ahmedabad.

The trial court has prima facie found that the get up of the sachet used by defendant No. 1 and the sachet used by the plaintiffs are quite similar. Looking to the facts of the case, the trial court has prima facie found that both the marks, i.e., 'VICKS' and 'VICAS' are written in such a manner that in normal circumstances an unwary customer would not be in a position to appreciate the difference between the two sachets and therefore on account of the phonetic and visual resemblance, the mark 'VICAS' used by defendant No. 1 is deceptively similar to the mark 'VICKS' used by the plaintiffs.

The trial court has also prima facie found that the plaintiffs were in prior use of the copyright of the artistic work used on the sachet of the cough drops and looking to the facts stated hereinabove and the reasons stated in the impugned interlocutory order, the trial court has prima facie come to the conclusion at the interlocutory stage that defendant No. 1 has violated rights of the plaintiffs emanating from the provisions of

the Trade Mark Act and Copyright Act and as the defendants are trying to pass off their goods as goods of the plaintiffs, the trial court, by an interlocutory order dated 6.4.99, has restrained the defendants from manufacturing or selling or otherwise dealing with the product under mark 'VICAS'.

#. I have heard learned advocate Shri R.R. Shah appearing for the appellant - original defendant No. 1 and Sr. Advocate Shri K.S. Nanavati appearing for the respondents Nos. 1 and 2 - original plaintiffs. Though served, nobody has appeared for respondent No.3-original defendant No. 2.

#. Ld. advocate Shri R.R. Shah appearing for the appellant has vehemently submitted that the impugned order passed by the trial court is not only unjust and improper but is also illegal for the reason that the trial court had no jurisdiction to entertain the suit. The sum and substance of the lengthy arguments advanced by the learned advocate is that the trial court has not looked into the fact that no cause of action had arisen at the time when the suit was filed. According to him, the suit was filed on 18.2.99 and prior thereto the cough drops manufactured by defendant No. 1 under name 'VICAS' had not been sold in the city of Ahmedabad. According to him, for the first time, the court commissioner found on 20.2.99 that defendant No. 2 was in possession of the cough drops under mark 'VICAS' manufactured by defendant No. 1. As per his submission, the cause of action must precede the filing of the suit and therefore it ought to have been established that before 18.2.99 the defendants were manufacturing or selling cough drops under mark 'VICAS' in a particular get up in the city of Ahmedabad.

#. Moreover, it has been submitted by him that the suit is not maintainable on the ground of joinder of several causes of action. It has been submitted by him that one suit for different causes of action arising under different Acts is not maintainable and, therefore, the suit ought not to have been entertained. According to him, different suits ought to have been filed for ventilating grievances under the provisions of the Trade Marks Act, Copyright Act and for an action for passing off.

#. The learned advocate has also advanced several technical objections pertaining to the procedural aspects. It has been submitted by the learned advocate that though there are two plaintiffs, the plaint was signed only by one person, namely, Shri Deepak Acharya.

As the plaint was signed by only one person i.e. for only one of the two plaintiffs, an application dated 30.3.99 was submitted by the plaintiffs praying for a permission to the effect that Shri Deepak Acharya who had signed the plaint should be permitted to make necessary amendment in the plaint by making an endorsement that he was signing the plaint on behalf of both the plaintiffs. The said application was granted and in pursuance of the said order, necessary endorsement in the plaint was made. Though the trial court had granted permission only for making an amendment in the plaint, Shri Acharya had also made such an endorsement on the injunction application. Similarly, Shri Deepak Acharya had also made such an endorsement on the vakalatnama at a later point of time. According to the learned advocate, the endorsements made by Shri Acharya on the injunction application and his signing the vakalatnama without obtaining any permission from the trial court was improper and, therefore, the injunction application should have been considered as defective and therefore no order could have been passed on the said injunction application and as the trial court had passed an order below the injunction application, the order passed by the trial court on the injunction application dated 6.4.99 is bad in law and therefore it should be quashed and set aside.

#. The learned advocate has also submitted that there is no infringement of registered trade mark 'VICKS' for the reason that 'VICKS' is a very common name in the U.S.A. and other European countries and as it is not an invented word, no proprietary right can be claimed in respect of the said term by the plaintiffs. Moreover, according to him, the words 'VICKS' and 'VICAS' are absolutely different, having different meanings and in normal circumstances, no person will be confused or deceived on account of dissimilarity between the said two words and, therefore, there cannot be any question with regard to infringement of the right of plaintiff No. 1.

##. It has also been submitted by him that on account of difference in name, get-up and colour scheme between both the products, namely, product manufactured by the plaintiffs and defendant No. 1, there cannot be any question with regard to passing off. No proof with regard to deception or confusion had been produced by the plaintiffs before the trial court to show that there was any case of deception or confusion and therefore also it cannot be said that defendant No. 1 was trying to pass off his goods as if they were the goods of the plaintiffs.

##. It has been further submitted by the learned advocate that there was no breach of any provision of the Copyright Act especially in view of the fact that the agreement between plaintiff No. 1 and plaintiff No. 2 with regard to permitting plaintiff No. 2 to use the colour scheme and get-up of the sachet was neither registered nor placed on record and in the circumstances, the court cannot take cognisance of the fact that plaintiff No. 1 had permitted plaintiff No. 2 to use the mark 'VICKS' with a particular colour scheme and get up. Moreover, for the purpose of establishing copyright, the plaintiffs ought to have placed on record the original work in respect of which the copyright was obtained by plaintiff No. 1. In the instant case, according to the learned counsel, a mechanically printed sachet was placed on record and such a sachet cannot be used to show that plaintiff No. 1 had any copyright in respect of the get up and colour scheme of the sachet which is used by the plaintiffs.

##. According to the learned advocate, there was no prima facie case for granting injunction in favour of the plaintiffs because the plaintiffs had not established breach of any of the provisions of the Copyright Act or the Trade Mark Act. According to him, there was no passing off. In the circumstances, there was no prima facie case in favour of the plaintiffs so as to interfere in the matter at an interlocutory stage by restraining defendant No. 1 from manufacturing or selling its product 'VICAS'.

##. It has been also submitted by him that no irreparable loss would be caused to the plaintiffs if defendant No. 1 is not restrained from manufacturing or selling its product under the mark 'VICAS' for the reason that in the event of the plaintiffs succeeding in the suit, they can be adequately compensated in terms of money because it was possible for the trial court to direct the litigants to produce the details about their sales, profits etc. in respect of the product in question. Such facts and figures could have rendered sufficient help to the trial court for determining the amount of compensation payable to the concerned party at the end of the trial. Defendant No. 1 had also shown its willingness to render accounts to the trial court so as to facilitate the trial court in awarding the amount of compensation which could have been awarded to the plaintiffs in the event of their succeeding in the suit. For the reasons stated hereinabove, it has also been submitted by the learned advocate that the balance of convenience was not in favour of the plaintiffs and

therefore defendant No. 1 could not have been prevented from manufacturing or selling their product under the mark 'VICAS'.

##. On the other hand, Sr. Advocate Shri Nanavati appearing for the plaintiffs - respondents Nos. 2 and 3, has supported the impugned order passed by the trial court whereby the defendants have been restrained from manufacturing and selling the said product under the mark 'VICAS'. He too has relied upon several judgments delivered by different high courts and the Hon'ble Supreme Court.

##. The sum and substance of the arguments advanced by Sr. Advocate Shri Nanavati in support of the case of the plaintiffs is that defendant No. 1 has violated the right given to the plaintiffs not only by the statutes but also by the common law because, by manufacturing and selling their product under the mark 'VICAS' with a colour scheme and get up which was in prior use by the plaintiffs, defendant No. 1 was trying to pass off its product as product of the plaintiffs. It has been submitted by him that the trial court was justified in granting the injunction in view of the fact that get up of the sachets used by both the manufacturers and the words 'VICAS' and 'VICKS' are so similar that 'VICAS' cough drops can be easily passed off as 'VICKS'.

##. So far as the aspect of jurisdiction is concerned, it has been submitted by him that on the basis of the averments made in the plaint, the trial court has to consider whether the court has jurisdiction to entertain the plaint. At the time of considering the question regarding jurisdiction at the interlocutory stage, the court need not look at the written statement or documents which are not referred to in the plaint. Only on the basis of the plaint, the question with regard to jurisdiction is to be decided at the initial stage and as submitted by him, the plaintiffs had made out a case in the plaint to the effect that the City Civil Court, Ahmedabad had jurisdiction because 'VICAS' was being sold in Ahmedabad and the said fact was later on established by the report of the court commissioner.

##. It has been further submitted by him that so far as the jurisdiction is concerned, the law is to the effect that even if the court exercises jurisdiction not vested in it, the order passed by the court would not be illegal if there is no failure of justice. He has thus submitted that, in the instant case, assuming without admitting that the City Civil Court, Ahmedabad has no jurisdiction,

the defendants have not established that there was failure of justice and, therefore, exercise of jurisdiction by the trial court was absolutely justified.

##. It has also been submitted by him that as per the provisions of sec. 20 of the C.P.C., as part of the cause of action has arisen in city of Ahmedabad, the City Civil Court at Ahmedabad has jurisdiction. He has submitted that there is an averment in the plaint that the defendants are selling cough drops under trade name 'VICAS' with a get up similar to that of 'VICKS' manufactured by the plaintiffs in Ahmedabad and the said fact was ultimately found to be correct when the court commissioner found that defendant No. 2 was selling cough drops under trade name 'VICAS' in city of Ahmedabad. Thus, it has been submitted by him that as per the provisions of sec. 20 of the CPC, part of the cause of action has arisen in Ahmedabad by sale of cough drops in Ahmedabad and therefore the court has jurisdiction to entertain the suit.

##. With regard to jurisdiction, it has been further submitted by Sr. Advocate Shri Nanavati that the question of jurisdiction is a mixed question of fact and law. The fact of cough drops 'VICAS' being sold in city of Ahmedabad has already been established by virtue of the report submitted by the court commissioner and therefore at this stage it cannot be said that the trial court has no jurisdiction to entertain the suit.

##. With regard to technical objections regarding signing of the Vakalatnama and an application praying for an injunction, it has been submitted by Sr. Advocate Shri K.S. Nanavati that the said objections should be ignored at this stage because such procedural defects, if any, should not come in the way of the Court in the process of doing justice. Regarding maintainability of the suit, it has been submitted by him that it was not necessary for the plaintiffs to file separate suits under different statutes as subject matter of the suit and parties to the suit are same. Accordingly to him, the suit is maintainable in the form in which it has been filed.

##. It has been submitted by Sr. Advocate Shri Nanavati that still the stage of evidence has not come and therefore it cannot be said that there would not be any evidence with regard to sale of cough drops under trade name 'VICAS' prior to filing of the suit. Evidence is yet to be led. Moreover, he has also submitted that 'quia timet' action is also maintainable in case of

infringement of a registered trade mark. It has been submitted by him that there is a statement in the plaint to the effect that the plaintiffs are doing the business in the entire country and therefore it has been impliedly stated that the cough drops under trade name 'VICKS' are also being sold in Ahmedabad by the plaintiffs. Thus, Sr. Advocate Shri Nanavati has submitted that there is an averment to the effect that cough drops 'VICKS' are being sold in Ahmedabad and till some evidence is led to the contrary, it cannot be concluded that cough drops 'VICKS' are not being sold in Ahmedabad and it cannot be said that the trial court has no jurisdiction.

##. With regard to maintainability of suit by plaintiff No. 2, it has been submitted by Sr. Advocate Shri Nanavati that plaintiff No. 2 is a licensee and plaintiff No. 1 is a registered owner or proprietor of the mark and therefore it cannot be said that the suit has not been filed by the registered proprietor of the mark 'VICKS'. This is in reply to the submission made by learned advocate Shri RR Shah that suit was not maintainable in view of the fact that plaintiff No. 2 is only a licensee.

##. Sr. Advocate Shri K.S. Nanavati has relied upon the observations made by the trial court with regard to similarity in the get up of both the products i.e. 'VICKS' and 'VICAS'. It has been submitted by him that the defendants are trying to pass off their inferior quality of goods as goods of the plaintiffs. He has shown the sachets in question to substantiate his submission that get up of both the sachets is quite similar. He has also tried to show that phonetically both names, 'VICKS' and 'VICAS', are also similar and therefore the product manufactured by defendant No. 1 is deceptively similar to the product of the plaintiffs.

##. I have heard learned advocate Shri RR Shah and Sr. Advocate Shri K.S. Nanavati and have also gone through a catena of judgements cited by them. Looking to the fact that several judgements have been cited, I do not think it necessary to refer to each and every judgment, but I shall be referring to only those judgments which are of vital importance for the purpose of arriving at the final conclusion in this appeal.

##. Before dealing with the submissions made by the learned advocates, I must note that this court is conscious of the fact that the present proceedings have been initiated at an interlocutory stage. Still the evidence has not been adduced. In this set of

circumstances, the question is as to what extent this court should interfere with the interlocutory order passed by the trial court. Moreover, making observations which might not be really warranted in this appeal might adversely affect the parties to the litigation at the time when the suit is finally decided and, therefore, I would like to restrain myself from making any such observation which might cause some prejudice to any of the litigants in the suit. This court is also conscious of the fact that much delay should not be caused in the final disposal of the suit where one of the parties has been restrained from carrying on its business activities but this court cannot be oblivious of the fact that if a person has a right to do business of manufacturing or selling, the said person cannot trade in a manner which would earn him profits of the goodwill, labour and hard work put in by another person.

##. It is also pertinent to note that the questions which are arising in the suit are with regard to violation of trade mark and copyright of the plaintiffs. The matter also pertains to passing off. Here this court is concerned with a medicinal product. One should not forget the fact that the rights given under the Trade Mark Act and Copyright Act are not only for protection of the rights of the registered owner of a copyright or a trade mark but these rights are also in the interest of general public so that they may not be misguided. A person desirous of purchasing a particular product manufactured by a particular person cannot be misguided or cheated by another manufacturer manufacturing a similar product. So, in addition to protection of rights of the dealers or manufacturers, the legislature would also like to protect an unwary and normal buyer.

##. The main objection which learned advocate Shri R.R. Shah has raised is with regard to the jurisdiction of the City Civil Court, Ahmedabad. He has submitted that the City Civil Court, Ahmedabad, has no jurisdiction to entertain the suit and, therefore, the interlocutory order passed on the Notice of Motion is bad in law. He has cited several authorities to substantiate his submission. On the other hand, Sr. Advocate Shri K.S. Nanavati has submitted that the City Civil Court, Ahmedabad has jurisdiction to entertain the suit and the suit has been rightly entertained at this stage. It is his submission that the question of jurisdiction is a mixed question of law and facts. At the initial point of time the court has only to look at the averments made in the plaint and the documents annexed to the plaint to determine whether the court entertaining the suit has

jurisdiction.

##. The question with regard to jurisdiction is a mixed question of law and facts. There is an averment in the plaint that cough drops 'VICAS' manufactured by defendant No. 1 are being sold in Ahmedabad. It has also been averred in the plaint that 'VICKS' manufactured by the plaintiffs is also being sold everywhere in the country. Upon reading the said averments, *prima facie* it is clear that defendant No. 1 is selling 'VICAS' in Ahmedabad and, therefore, the City Civil Court, Ahmedabad, has jurisdiction to entertain the suit. It is pertinent to note that the court commissioner who was appointed by the City Civil Court had in fact found cough drops 'VICAS' being sold in Ahmedabad on 20.2.99. This fact clearly denotes that the averment which has been made in the plaint with regard to sale of cough drops 'VICAS' in Ahmedabad is found to be correct.

##. In the instant case, the question with regard to jurisdiction cannot be gone into at this stage because the said question can be decided only after evidence is recorded. At this stage the court has only to see whether there is an averment with regard to jurisdiction in the plaint and in the related documents. Such a view has been taken by several High Courts and in the circumstances I do not desire to reproduce all the citations. One such view has also been taken in the case of P.M. Diesels Ltd. v. Patel Field Marshal Industries, 198 PTC (18), which is reproduced hereinbelow:-

"The jurisdiction of a court does not depend upon the defence taken by a defendant and it is the allegations made in the plaint which decide the forum. The court, while considering an application for grant of temporary injunction can, however, go into the question whether, *prima facie*, it has jurisdiction or not and for the said purpose not only the pleadings but the affidavits, documents and other material on record can be examined. Therefore, for the purposes of forming *prima facie* opinion the court can travel beyond what is averred in the plaint."

##. A similar question had arisen in the case of M/s. Richardson Vicks Inc. and *anr.* v. Vicas Pharmaceuticals, 90 PTC 16 wherein it was held that as there was an averment in the plaint that the defendant's

goods were being sold in Delhi and as there was infringement of copyright, prima facie it cannot be said that the court entertaining the suit in Delhi had no jurisdiction.

##. It is also pertinent to note that sec. 20 of the CPC also provides that when cause of action has arisen at several places, the suit can be entertained at any of the places where the cause of action had arisen. In the instant case, it is not in dispute that the court commissioner has found that the defendants were selling their cough drops under trade name 'VICAS' in Ahmedabad.

##. It is also pertinent to note that so far as question of jurisdiction is concerned, the Hon'ble Supreme Court has held in case Koopilan Uncen's daughter Pathumma and others vs. Koopilan Kutty, AIR 1981 SC 1683, subject to fulfillment of certain other conditions, that even if a court has exercised its jurisdiction not vested in it, the order passed by the court should not be disturbed unless it is shown that the order had resulted into failure of justice. In the instant case, at the interlocutory stage, the defendants have been restrained from manufacturing and selling the product in question as prima facie it has been found that the defendants were violating statutory rights of the plaintiffs. Still evidence has not been adduced and prima facie it has been found that the products of the plaintiffs and defendants are sold in Ahmedabad. In the circumstances, prima facie it appears that the impugned order of the trial Court has not resulted into failure of justice.

##. Thus, for the reasons stated hereinabove, I come to the conclusion that at this stage it would be too early to say that the trial court has no jurisdiction. Needless to say that after weighing the evidence and after hearing the concerned parties, the trial court can come to a different conclusion at a later point of time but at this stage, in my opinion, it cannot be said that the trial court has no jurisdiction.

##. Another submission of learned advocate Shri R.R. Shah is with regard to non-maintainability of the suit because of joinder of several causes of action. It has been submitted by him that the suit is based on several different actions under the provisions of the Copyright Act and Trade Marks Act and it is also based on the action of passing off. Then the question which arises is whether a single suit is maintainable.

##. The normal principle is that multiplicity of

litigation should be avoided by the litigants and therefore all causes of action which are pertaining to each other should be joined together in one civil suit. Even the CPC provides for it. Order II rule 3 of the CPC clearly provides that a plaintiff may unite in the same suit several causes of action against the same defendant. Similar issue had arisen in the case M/s. Jay Industries v. M/s. Nakson Inds. In the said case, in the plaint the question with regard to violation of the copyright and trade mark had been alleged. Similar plea, as raised by learned advocate Shri R.R. Shah, was raised in the said suit. After discussing the legal provisions it has been observed by the Division Bench of Delhi High Court consisting of B.N. Kirpal, J. (as he then was) and Ms. Santosh Duggal, J. as under:-

"In the instant case there is one plaintiff and one defendant. The two different causes of action in effect pertain to the same transaction. The allegation of the plaintiff is that the defendant is selling goods by mislabelling them and by infringing the trade mark and copyright of the plaintiff. The sale is alleged to be made in cartons similar to the ones in which the plaintiff had a copyright and it is further alleged that those cartons contain the trade mark which is registered in the plaintiff's name. A single transaction of sale by the defendant, in effect, results in the infringement of both the trade mark and copyright of the plaintiff."

##. Looking to the abovereferred legal position, in my opinion, in the instant case also, it cannot be said that the suit is vitiated on the ground of misjoinder of causes. So as to avoid multiplicity of litigation and proceedings which result into delay and burden on the courts and the litigants, in my opinion, it is advisable to file a common suit as per the provisions of Order II rule 3 of the CPC. The said provision clearly contemplates joinder of causes of action. Thus, the argument with regard to misjoinder of causes of action does not appear to be just and proper. In the circumstances, I hold that the validity of the suit is not vitiated on the ground of misjoinder of causes.

##. Learned Advocate Shri Shah has made several super technical submissions with regard to signing of the plaint, carrying out of the amendment and signing of certain documents only by one of the plaintiffs. I consider these arguments and submissions to be of super technical nature. It is a well settled legal position

that as far as possible, no proceeding in a Court of Law should be allowed to be defeated on mere technicalities because all rules of procedure are intended to advance justice and not to defeat it. The Hon'ble Supreme Court has observed in case of Sangram Singh Vs. Election Tribunal, Kotah, AIR 1955 SC 425 that -

"Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties; not a thing designed to trip people up.
..."

##. The above referred well established legal position clearly reveals that the court has to give more importance to the substance and not to the procedural law while administering justice. Signing here or there with or without permission of the court in the matter of amending the plaint or in the matter of signing application are all procedural aspects. Everywhere, at least one of the plaintiffs has signed. The question with regard to legal right of the person signing the plaint on behalf of the plaintiffs cannot be entertained at such an interlocutory stage. It is not in dispute that the signatory to the plaint was authorised by the plaintiffs to file the suit. The objection is to the effect that the fine details to be mentioned in the plaint were not stated in the resolution whereby the signatory to the plaint namely Mr. Deepak Acharya was empowered to file the suit.

##. It appears that the defendants want to put much reliance on the technicalities. One has to look at the substance in the case rather than going to such super technical details at an interlocutory stage. In the circumstances, I do not think it proper to entertain the objections with regard to signatures of the plaintiffs etc. at this interlocutory stage.

##. Having considered the fact that the court has jurisdiction and the suit is maintainable, one has to look at the sum and substance of the allegations made in the plaint. The grievance of the plaintiffs in a nutshell is that rights of the plaintiffs under the Trade Mark Act and Copyright Act have been violated and the defendants are passing off their goods i.e. their cough drops named 'VICAS' as 'VICKS'. I am conscious of the fact that still the parties have not led the evidence. Prima facie, one has to see whether the goods manufactured and sold by the defendants are deceptively

similar to the goods manufactured and sold by the plaintiffs. The law on the subject has been settled since long and merely by looking at some of the judgments one can find out whether the goods manufactured by the defendants can be said to be deceptively similar to those of the plaintiffs. It is a well established principle that for the purpose of ascertaining whether the goods are deceptively similar, one has not to look at the goods like a meticulous or a methodical person, who is having excellent or photogenic memory and who makes a comparison every time when he purchases goods. In such a case one has to look at an average person with average memory and imperfect recollection. In the instant case, the two products with which the court is concerned are 'VICKS' and 'VICAS'. It has been submitted by learned advocate Shri R.R. Shah for the defendants that phonetically both words are different. It is true that spelling of both words are different and phonetically also there is a difference between the two. The Hon'ble Supreme Court had an occasion to determine such an issue in the case Corn Products Refining Company v, Shangrila Food Products Ltd., AIR 1960 SC 142. Looking to the law laid down by the Hon'ble Supreme Court in the case of Corn Products Refining Co. (*supra*) and the observations made by the Hon'ble Supreme Court, one can clearly say that the phonetic difference which learned advocate Shri R.R. Shah is referring to is not of much importance as we are concerned with a person of average intelligence and imperfect recollection who is likely to err while making a decision with regard to purchase of cough drops. In the instant case, one has to see whether the product of the defendants is likely to cause confusion. The defendants might not be having any intention to deceive a customer but the product of the defendants should not be such which would even cause confusion in the mind of a buyer of average intelligence and imperfect recollection. In case of Parkar - Knoll Ltd. Vs. Knoll International Ltd., (1962) RPC 265, Lord Denning has explained meaning of the words "to cause confusion" in a very succinct manner as under:-

"Secondly, "to deceive" is one thing. To "cause confusion" is another. The difference is this: When you deceive a man, you tell him a lie. You make a false representation to him and thereby cause him to believe a thing to be true which is false. You may not do it knowingly, or intentionally, but still you do it, and so you deceive him. But you may cause confusion without telling him a lie at all, and without making any false representation to him. You may indeed tell

him the truth, the whole truth and nothing but the truth, but still you may cause confusion in his mind, not by any fault of yours, but because he has not the knowledge or ability to distinguish it from the other pieces of truth known to him or because he may not even take the trouble to do so."

##. In the instant case, upon perusal of both the products, one may get confused as names of the products and get up under which they are being sold are deceptively similar and they would surely cause confusion. As the Hon'ble Supreme Court has observed in case Corn Products Refining Co. (supra), one has to look at the first impression which a person would have upon seeing the products. Upon the first impression, as observed by the trial court, a customer is likely to be confused on account of phonetic similarity and similarity in the get up of both the products.

##. There is one more important thing in this case. The product is a medicinal product. Though it is a medicinal product, it is not covered under the provisions of Drugs and Cosmetics Act. It can be sold over the counter without any prescription. In my opinion, when the court is concerned with any medicinal product, the court has to be more cautious for the reason that an average person with average intelligence and imperfect recollection should not be misguided and should not, due to some mistake or due to inadvertence, purchase another product. A similar question had arisen in case of 'calmpose' and 'calmprose' in the case of Ranbaxy Laboratories v. Dua Pharmaceutical Ltd., AIR 1989 Delhi 44. The drug which was subject matter of the said litigation was a scheduled drug and it was not open to a consumer to get the drug without prescription of a doctor. It was the case of the defendant in that case that as the drug was a scheduled drug, chances of making a mistake or having a confusion were not there. Dealing with the said argument, the Court had observed as under:-

"....It is true that the said drugs are supposed to be sold on doctor's prescription, but it is not unknown that the same are also available across the counters in the shops of various chemists. It is also not unknown that the chemists who may not have 'CALMPOSE' may pass off the medicine 'CALMPROSE' to an unwary purchaser as the medicine prepared by the plaintiff. The test to be adopted is not the knowledge of the doctor, who is giving the prescription. The test

to be adopted is whether the unwary customer who goes to purchase the medicine can make a mistake." (emphasis supplied).

##. Again, in the said case also, the court had come to a conclusion that one has to look at an unwary customer and even if the drug is a scheduled drug, possibilities of confusion cannot be ruled out. In the light of the observations made in the judgement in case of Ranbaxy Laboratories Ltd. (*supra*), the case of the plaintiffs becomes stronger for the reason that the sachet of cough drops with which we are concerned at present is not a scheduled drug and any person can have it on the counter without prescription of a doctor and therefore chances of having confusion in the mind of an unwary customer are substantially more.

##. It is pertinent to note that both the products were produced before the trial court and before this court. Upon perusal of both the products, the first impression which the learned Judge of the trial court had was that the product manufactured by defendant No. 1 is deceptively similar to the one which is manufactured by the plaintiffs. The mode in which the words 'VICKS' and 'VICAS' have been written and the get up in which they are being sold are quite similar. So as to ascertain whether the products are deceptively similar, one has not to have careful examination of both the products or to compare them by keeping them side by side, but one has to be guided by common sense and general observation. If, at the first sight, both the products appear to be similar, one can very well say that there is an element of deceptive similarity in the products.

##. Having *prima facie* come to a conclusion that the product of defendant No.1 is deceptively similar to that of the product of the plaintiffs, the question is now with regard to grant of injunction.

##. The court has to consider whether injunction should be granted in favour of the plaintiffs so as to restrain the defendants from manufacturing the product or to ask the defendants to maintain accounts so that ultimately in the event of the defendants failing in the suit, the court can adequately compensate the plaintiffs.

##. For the purpose of deciding whether injunction should be granted in such cases, one has to look at the question of balance of convenience. In the instant case, the plaintiffs are in the business of manufacturing

products under trade name 'VICKS' for several years and in several countries and there is material on record to show that substantial amount has been spent by the plaintiffs for the purpose of making the product popular and for enhancing sale of the product.

##. Once the plaintiff establishes a prima facie case and if the balance of convenience is in favour of the plaintiff, the court can very well assume that irreparable injury would follow if ad-interim injunction is not granted in favour of the plaintiff. This is the normal sound principle which the court follows in the matter of grant of injunction. Applying the said principle to the present case, it is very clear that a prima facie case has been established by the plaintiffs because the product which the defendants are selling is deceptively similar to the one which is manufactured and sold by the plaintiffs. Upon perusal of the record available to the court, prima facie, it appears that the plaintiffs have acquired a very good reputation and its products under the name 'VICKS' are being sold not only in the country but also elsewhere. Looking to the said fact, in my opinion, balance of convenience would surely tilt in favour of the plaintiffs. In the case where medicinal products are being sold, which are deceptively similar, harm would not only be caused to the plaintiffs but it would also be caused to innocent consumers who, as a result of confusion, might purchase a medicinal product prepared by another person which they in fact never wanted to buy. In the instant case, it has also been submitted by the learned advocates that ingredients of both the products i.e. the product manufactured by the plaintiffs and defendant No. 1 are different. If a consumer having an intention to have ingredients of product A, buys product B having different ingredients, it would not be in the interest of the consumer as he would be consuming medicines which are absolutely different than the one which he wanted to consume. In my opinion, in case of medicinal products, the court has to be more cautious and has to grant injunction where the court feels that an innocent and unwary consumer is likely to have some confusion while identifying the product which he would like to purchase. In the matter of grant of injunction, the court has also to see whether non-interference of the court would result into irreparable injury to the party seeking the injunction. If the court comes to a conclusion that there is no other remedy available to the party except the one with regard to injunction, the plaintiff seeking injunction should be suitably protected so that the apprehended injury may not be caused to the plaintiff.

##. It has been observed by the Hon'ble Supreme Court in Wander Ltd. Vs. Antox India P. Ltd., 1990(Supp) SCC 727 that appellate Court should not interfere with the exercise of discretion of the Court of the first instance and substitute its own discretion except when it finds that the discretion was used by the Court of the first instance in an arbitrary or capricious or perverse manner or it had ignored the settled principles of law regarding grant or refusal of interlocutory injunction. In the instant case, in my opinion, the trial Court has not committed any error or has not ignored any of the settled principles governing grant of interlocutory injunction and, therefore, I do not think that this Court should interfere with the discretion used by the trial Court.

##. In the instant case, the plaintiffs have satisfied the court that there is a prima facie case in favour of the plaintiffs. The balance of convenience is also in favour of the plaintiffs and, as stated hereinabove, the product is a medicinal product and, therefore, it would be also in the interest of the consumers, if the defendants are restrained from manufacturing the product which is deceptively similar to the one which is manufactured and sold by the plaintiffs. In the instant case, the position of the plaintiffs is surely superior to that of the defendants and, therefore, one can have no hesitation in saying that the balance of convenience is definitely in favour of the plaintiffs. When the defendants knowingly manufacture a product under trade name 'VICAS' having get up similar to that of 'VICKS' manufactured by the plaintiffs, the court should not hesitate in grant of injunction in favour of the plaintiffs so as to prevent damage being caused to the plaintiffs. Moreover, looking to the principles laid down by the Hon'ble Supreme Court in the case of N.R. Dongre vs. Whirlpool Corporation, (1996) 5 SCC 714, the trial Court has rightly protected the plaintiffs by granting the injunction in their favour and I do not see any reason to interfere with the impugned interlocutory order passed by the trial Court and, therefore, the appeal is dismissed with no order as to costs.

##. Looking to the facts of the case and in view of the fact that the injunction is operating against the defendants, it is hoped that the trial Court shall give priority to the suit and shall finally dispose of the same as soon as possible and preferably before 30.9.2000.

(hn)